SLAVERY, LIBERTY, AND THE RIGHT TO CONTRACT

Rebecca E. Zietlow*

TABLE OF CONTENTS

INTRODUCTION

According to the Declaration of Independence, "all men are created equal . . . endowed, by their Creator, with certain unalienable rights . . . [including]

* I presented versions of this paper at A Workshop on Legal Transitions and the Vulnerable Subject: Fostering Resilience through Law's Dynamism as well as The Thirteenth Amendment and Economic Justice Symposium. Thank you to all the participants in these workshops for your helpful comments, especially Fred Smith and Jack Chin. Thanks to the planning committee and all the students who worked to make the symposium a success, especially the inimitable Ruben Garcia. Thanks to Ken Kersch, Jim Pope, and Mary Ziegler for their thoughtful comments on an earlier draft of this paper, and to my excellent research assistant, Kyle Clauss. Thanks to the University of Toledo College of Law for funding my research. Finally, thanks to all of the editors of the Nevada Law Journal, especially Shannon Zahm and Becky Crooker, for your hard work and assistance with this article.

life, liberty, and the pursuit of happiness."[1] This foundational document from 1776 continues to resonate in our national consciousness. Yet at the time of the Declaration, over half a million people in the nascent United States did not enjoy the right to liberty.[2] Most of those people were enslaved through the system of chattel slavery.[3] Many northern workers were also tied to their employers through the practice of peonage.[4] For those people, liberty was an empty promise until after the Civil War, when the Thirteenth Amendment to the United States Constitution abolished both slavery and involuntary servitude.[5]

Central to the Thirteenth Amendment's promise of liberty is the right of workers to contract freely for their labor. This article explores what the right to contract meant to slaves, free blacks, and northern workers before and after the Civil War—to uncover the lost history of liberty of contract under the Thirteenth Amendment. Leaders of the Reconstruction Congress recognized that freed slaves, northern workers in debt peonage, and even early industrial workers, were vulnerable to exploitation.[6] To them, freedom of contract was not an end in itself; it was a means to the end of achieving equal citizenship and fundamental rights for freed slaves and empowering all workers to exercise more control over their working lives. The Reconstruction Congress regulated contracts to prevent the exploitation of labor through practices reminiscent of slavery.[7]

The conventional model of liberty of contract is the individualist right to be free of government interference, embraced by the Supreme Court in *Lochner v. New York*.[8] Indeed, *Lochner* has become an iconic case for libertarians and other scholars opposing economic regulation.[9] Some scholars support the Loch-

---

[1] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[2] *See The Constitution and Slavery*, CONST. RTS. FOUND., http://www.crf-usa.org/black-history-month/the-constitution-and-slavery [https://perma.cc/QF3B-4LEL] (last visited Jan. 14, 2019); *see also* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 223–24 (1998).

[3] *See* Sanford Levinson, *Slavery in the Canon of Constitutional Law*, *in* SLAVERY & THE LAW 89, 94 (Paul Finkelman ed., 1997).

[4] ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870 122 (1991).

[5] U.S. CONST. amend. XIII.

[6] *See* CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (providing debates over the 1867 Anti-Peonage Act); *see infra* notes 274–89 and accompanying text.

[7] For example, the Reconstruction Congress regulated contracts with the 1868 Eight Hour Act, the 1867 Anti-Peonage Act and the 1866 Civil Rights Act. *See* Eight Hour Act, ch. 72, 15 Stat. 77 (1868); Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. §§ 1581–1585 (2012) and 42 U.S.C. § 1994 (2012)); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1983 (2012)); *see also infra* Section III.C.

[8] Lochner v. New York, 198 U.S. 45, 61 (1905); *see* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 53, 55 (2014); *see also* Richard A. Epstein, *Toward a Revitalization of the Contracts Clause*, 51 U. CHI. L. REV. 703, 705 (1984).

[9] *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 8 (2011); *see also* CLINT BOLICK, DEATH GRIP: LOOSENING

nerian liberty of contract for normative reasons on the grounds that it furthers autonomy for workers.[10] Others argue that the Court's ruling in *Lochner* is consistent with the understanding of liberty of contract during the Reconstruction Era and thus justified on originalist principles.[11] This article focuses on the latter argument. A close examination of the antebellum and Reconstruction Era debates over liberty of contract reveals that the free labor ideology was more complex than most constitutional scholars have heretofore acknowledged.[12] This article shows, contrary to conventional wisdom, that the Thirteenth Amendment based right to contract does not bar government intervention. Instead, it *invites* government intervention to empower workers exercising that right.

In the antebellum era, fugitive slaves and northern workers invoked the Declaration of Independence as they called for measures to end slavery and promote free labor.[13] Antislavery activists developed a doctrine of labor which was premised on liberty of contract—the ability of a worker to freely contract with one's employer and enjoy the fruits of his own labor.[14] These activists developed different strands of thought on the meaning of liberty of contract. Moral abolitionists, such as William Lloyd Garrison, believed that freedom of contract was a value in and of itself.[15] They sought government intervention solely to ensure that freed slaves could contract for their labor.[16] Antislavery republicans, however, developed a more robust model of liberty of contract, one that invoked state intervention to prevent private exploitation reminiscent of slavery and involuntary servitude.[17] Those activists saw the end of slavery as part of a

---

THE LAW'S STRANGLEHOLD OVER ECONOMIC LIBERTY 46 (2011); Epstein, *supra* note 8, at 732.

[10] *See, e.g.*, BERNSTEIN, *supra* note 9, at 9, 16.

[11] *See, e.g.*, BARNETT, *supra* note 8, at 224; *see also* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 188 (2004) (arguing that freed slaves embraced an ideology of individualism, which flowed naturally from the "individualist-oriented free labor ideology" of the antislavery cause, justifying an anti-statist approach to the regulation of contracts).

[12] *But see* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 769, 774 (1985) (describing divergent strands of free labor ideology in the Reconstruction Era).

[13] *See, e.g.*, *Address of the Colored National Convention to the People of the United States, Rochester, New York*, *July 6–8, 1853 in* THE RECONSTRUCTION AMENDMENTS (13TH, 14TH & 15TH): ESSENTIAL DOCUMENTS VOLUME I 203 (Kurt T. Lash Ed.) (forthcoming 2019) (calling for "the blessing of liberty to all"); DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 1862-1872 238 (1st ed. 1967) (noting that Fincher's Trade Review masthead said "Eight Hours, A Legal Day's Work for Freemen" demonstrating "[t]he struggle for shorter hours, in other words, was seen as a fight for the liberty of the worker.").

[14] *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11 (1995).

[15] *See* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 20 (1998).

[16] *See id.* at 18, 35.

[17] *See* Forbath, *supra* note 12, at 777–78.

larger effort to enforce liberty for all workers.[18] They sought an alliance with the nascent labor movement, which advocated its own version of liberty of contract—freedom from undue coercion in the workplace.[19] Both strands of the antislavery movement influenced the Reconstruction Congress, but in that Congress the broader, more substantive model of liberty of contract prevailed.

Few members of the Reconstruction Congress adopted the narrower view of liberty of contract adopted by the Court in *Lochner*.[20] The vast majority of members of that Congress understood that government intervention was necessary to enable freed slaves to enter into contracts and enjoy the fruits of their own labor.[21] They understood that slavery was a private relationship, albeit one with the imprimatur of the state.[22] Thus, for the freed slave, liberty required much more than simple freedom of contract. The Reconstruction Congress enacted legislation to block contracts that interfered with freedom of labor because they understood that the mere formal right to contract was insufficient to ensure actual freedom.[23] Moreover, the Reconstruction Congress invoked the Thirteenth Amendment as it intervened in employment contracts to protect not only the rights of newly freed slaves, but also the rights of northern workers.[24]

The remainder of this article draws on the testimonies of fugitive slaves, free blacks, and northern workers to illustrate what liberty of contract meant to the people on the ground who sought its protection. Influenced by these people, antislavery activists developed a doctrine of free labor based on liberty of contract. This article then explores the debates in the Reconstruction Congress when they enacted legislation to enforce the Thirteenth Amendment and protect liberty of contract. Those measures included: the 1866 Civil Rights Act, which established a right to contract free of racial discrimination; the 1867 Anti-Peonage Act, which prohibits involuntary servitude for all workers; and the 1868 Eight Hour Act, which limited the hours of work for federal workers to

---

[18] *See* REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 66 (2018).

[19] *See* MONTGOMERY, *supra* note 13, at 114; *see also* ZIETLOW, *supra* note 18, at 46, 61.

[20] A few members of that Congress argued that the 1868 Eight Hour Act violated the right to contract, expressing a view similar to that of the Court in *Lochner*. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 413 (1867) (documenting Senator William Pitt Fessenden's objections to compelling everyone to abide by fixed hours of labor); *see also* CONG. GLOBE, 40th Cong., 2d Sess. 3426 (1868) (noting Representative Lot Morrill's objections to limiting employment contracts, seeing them as a degradation against the working class).

[21] Fessenden and Morrill were outvoted when Congress approved the 1868 Eight Hour Act. *See* Eight Hour Act, ch. 72, 15 Stat. 77 (1868).

[22] The Thirteenth Amendment's abolition of slavery and involuntary servitude applied to private activity. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[23] *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 1572 (1867) (providing support for the 1867 Anti-Peonage Act, including Pennsylvania Senator Charles Buckalew who agreed that the terms of debt service were "always exceedingly unfavorable to" the laborer and argued that the system "degrades both the owner of the labor and the laborer himself . . .").

[24] For example, the 1867 Anti-Peonage Act applied to all workers in the United States, and the 1868 Eight Hour Act limited the hours of federal workers, who mostly worked in the north. *See infra* Section III.C.

eight hours a day.[25] Paradoxically, then, the Reconstruction Congress enacted precisely the type of regulations that the *Lochner* era Court struck down as violating liberty of contract.[26]

I. UNFREE LABOR AND FREEDOM OF CONTRACT IN THE ANTEBELLUM ERA

The right to contract has its roots in Revolutionary times when liberty referred primarily to freedom from government oppression.[27] It was considered to be a natural right—a fundamental human right—which the government could not deny.[28] However, even during the revolutionary era the reality of slavery and indentured servitude starkly contrasted with this ideology of liberty. The so-called "land of the free" was economically dependent on coerced labor.[29] Prior to the Civil War, our nation's economy depended on the brutal, inhumane and morally unconscionable practice of chattel slavery.[30] The vast majority of slaves were Africans or of African descent, and the institution of slavery was brutally racist.[31] Slave masters could beat, even kill, their slaves with impunity.[32] Families were separated, and children sold away from their mothers, making it difficult for enslaved people to form lasting bonds with their loved ones.[33] Because the laws of slave states treated slaves as less than people, the slaves

---

[25] *See* Eight Hour Act, ch. 72, 15 Stat. 77 (1868); Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. §§ 1581–1585 (2012) and 42 U.S.C. § 1994 (2012)); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1983 (2012)).

[26] For example, the 1866 Civil Rights Act prohibited people entering into contracts from discriminating on the basis of race, the 1867 Anti-Peonage Act prohibited workers from entering into contracts that imposed involuntary servitude on them, and the 1868 Eight Hour Act prohibited federal workers from contracting to work more than eight hours a day. *See* discussion *infra*, Sections III.C., III.D. In *Lochner v. New York*, the Court struck down a similar law, limiting the working hours of bakers, as violating liberty of contract. Lochner v. New York, 198 U.S. 45, 53, 64 (1905).

[27] *See* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 5 (2012).

[28] *Id.* at 9.

[29] *See* DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 13 (1993).

[30] *See id.*

[31] *See* Paul Finkelman, *The Centrality of Slavery in American Legal Development*, *in* SLAVERY & THE LAW 3, 5–6 (Paul Finkelman ed., 1997).

[32] *See* Judith Kelleher Schafer, *"Details Are of a Mostly Revolting Character": Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, *in* SLAVERY & THE LAW 241, 243–44 (Paul Finkelman ed., 1997).

[33] The brutality of slavery is evident from the infamous story of Margaret Garner, a fugitive slave who killed her two-year daughter to prevent her from returning to slavery. R. J. M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY 249 (2018). By murdering her daughter, Garner expressed her belief that death was preferable to slavery. *Id.*

lacked any civil, social, or political rights—including the right to contract.[34] Enslaved people lacked any autonomy whatsoever, and they had absolutely no power to redress their inhumane conditions of work.

However, enslaved people did assert their own rights in a concrete and poignant manner. Thousands risked their lives attempting to escape.[35] By doing so, they asserted their humanity and demanded fundamental human rights.[36] Fugitive slaves invoked the Declaration of Independence as they claimed the right to work for themselves.[37] Northern free blacks and their white sympathizers supported the fugitive slaves by participating in the Underground Railroad to help them escape and holding mass demonstrations to stop the return of suspected fugitives.[38] Free blacks called for laws that would enable them to exercise the right to contract along with other fundamental human rights. They demanded the right to be treated as citizens, with full rights equal to whites, including the equal right to contract.[39] Fugitive slaves and free blacks alike demanded autonomy, but they also sought government protection, so they could enjoy that autonomy.[40]

Chattel slaves were not the only unfree workers in antebellum America. In the north, thousands of workers were indentured servants, bound to their masters for a period of years and unable to leave them regardless of the conditions of work.[41] Often, the indentured servant became further indebted, lengthening his term of service.[42] These indentured servants could be criminally punished if they left before the term of servitude had expired, and the so-called "Fugitive

---

[34] Slaves were treated as property, not people, and therefore lacked any human rights. *See* Jacob I. Corré, *Thinking Property at Memphis: An Application of Watson*, *in* SLAVERY & THE LAW 437, 437–38 (Paul Finkelman ed., 1997). The right to contract was central to antislavery ideology because slaves lacked that right. *See* FONER, *supra* note 14, at 11; *see also* STANLEY, *supra* note 15, at xiii.

[35] BLACKETT, *supra* note 33, at 3–5.

[36] *See id.* at xv ("By their actions [fugitive slaves] contributed to a fundamental reordering of the world they knew and opened the possibility of joining the world as full-fledged citizens.").

[37] For example, escaped slave William Craft explained, "Having heard . . . that the American Declaration of Independence says, that . . . all men are created equal; that they are endowed by their Creator with certain inalienable rights . . . we could not understand by what right we were held as 'chattels.' " WILLIAM & ELLEN CRAFT, RUNNING A THOUSAND MILES FOR FREEDOM; OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY iii (1860).

[38] *See* BLACKETT, *supra* note 33, at 191.

[39] *See, e.g.*, *Declaration of Wrongs and Rights* (Oct. 4, 1864), *in* PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN 41, 42 (1864). ("[A]s citizens of the Republic, we claim the rights of other citizens. We claim that . . . proper rewards should be given for our services, and that the immunities and privileges of all other citizens and defenders of the nation's honor should be conceded to us . . . . and we claim our fair share of the public domain, whether acquired by purchase, treaty, confiscation, or military conquest.").

[40] *Id.* at 56, 60.

[41] *See* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 248 (1993).

[42] *See* STEINFELD, *supra* note 4, at 110.

Slave" Clause of Article IV obligated the return of indentured servants, as well as slaves, if they fled to other states.[43]

Moreover, by the mid-Nineteenth Century, industrialization began to transform the lives of U.S. workers. Industrial workers were less autonomous and had a more distant relationship with their employers. Increasingly, industrial workers realized that they would never be able to attain the ideal of self-ownership and economic independence.[44] "Free labor" came to mean the freedom from "wage slavery," free of undue exploitation and more control over one's working life.[45] In the name of free labor, northern labor activists called for the government to regulate their employment contracts and limit their hours of work.[46] Freedom of contract was thus mostly an illusion to millions of United States workers. All of these workers wanted liberty, but they also sought government regulation to make that liberty effective.

A. The Right to Contract in Antebellum America

Freedom of contract in the employment relationship was a central component of the transition from the feudal-like system of slavery and indentured servitude in the Nineteenth Century.[47] According to historian Robert Steinfeld, "[t]he property that masters had enjoyed for centuries in the labor of their servants now began to be reimagined as the product of a voluntary transaction struck between two separate and autonomous individuals."[48] Historian Amy Dru Stanley agreed: "In the age of slave emancipation contract became a dominant metaphor for social relations and the very symbol of freedom."[49] Under the theory of freedom of contract, the employee himself was no longer a commodity but his labor was a commodity, to be sold it on equal terms with its buyer, his employer.[50] The right to contract was premised on self-ownership.[51] A worker who enjoyed liberty of contract was entitled to the fruits of his own

---

[43] *See* U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."); HOANG GIA PHAN, BONDS OF CITIZENSHIP: LAW AND THE LABORS OF EMANCIPATION 12 (2013); STEINFELD, *supra* note 4, at 28.

[44] *See* TOMLINS, *supra* note 41, at 308.

[45] For example, the National Labor Union in 1867 called for working men to protect themselves against the interests of capital by cooperating with one another. MONTGOMERY, *supra* note 29, at 49.

[46] *See* MONTGOMERY, *supra* note 13, at 186.

[47] *See* KERSCH, *supra* note 11, at 137 (arguing that imagining the worker as a "free-standing, autonomous individual . . . from the shackles of feudalism" was "the fruit of a radically reformist emancipatory political project.").

[48] STEINFELD, *supra* note 4, at 80.

[49] *See* STANLEY, *supra* note 15, at x.

[50] *See* STEINFELD, *supra* note 4, at 80.

[51] Forbath, *supra* note 12, at 783; *see also* STEINFELD, *supra* note 4, at 3.

labor.[52] Slaves obviously lacked liberty of contract, as did indentured servants. Obtaining liberty of contract was the primary goal of the antislavery and antebellum labor movements, but they held differing views of what that freedom would mean.[53]

Moral abolitionists adopted the liberal ideology of contract, which "idealized ownership of self and voluntary exchange between individuals who were formally equal and free."[54] For example, in 1835 the Ohio Anti-Slavery Society resolved, "that instead of being under the unlimited control of a few irresponsible masters" freed slaves "shall receive the protection of law, that they shall be employed as free labourers, fairly compensated and protected in their earnings."[55] Some abolitionists assumed that all workers who could enter into contracts enjoyed liberty of contract.[56] They did not concern themselves with the plight of northern workers who had the ability to enter into contracts for their labor.[57] To those abolitionists, workers were entitled to no more than formal liberty of contract.[58] They assumed that workers, including freed slaves, would eventually earn enough money to buy their own shop or farm.[59] Thus, the aspirations of these activists were "thoroughly middle-class."[60]

While those abolitionists viewed liberty of contract as an end in and of itself, members of the political antislavery movement developed a broader view of liberty of contract. They argued that liberty of contract meant economic independence and ownership of productive property "because such independence was essential to participating freely in the public realm."[61] These antislavery republicans saw economic independence and independence as a citizen as intertwined. In the Civil War era north, "the symbiotic relationship between political and economic liberty had become an article of faith . . . ."[62] During the debate over slavery and emancipation, contract based on "personal volition rather than external force" became a metaphor for freedom.[63]

Moreover, some antislavery activists saw the end of slavery as part of a larger movement to secure the rights of all workers, empowering them to enable them to exercise meaningful liberty of contract. For example, Ohio Republican James Ashley declared that he was "opposed to all forms of ownership of men, whether by the state, by corporations, or by individuals. . . . If I must be a

---

[52] *See* STEINFELD, *supra* note 4, at 86.
[53] MONTGOMERY, *supra* note 13, at 247.
[54] STANLEY, *supra* note 15, at x.
[55] PROCEEDINGS OF THE OHIO ANTI-SLAVERY CONVENTION 8 (1835).
[56] Forbath, *supra* note 12, at 786.
[57] *Id.* at 784.
[58] *See id.* at 785–86.
[59] FONER, *supra* note 14, at 17.
[60] *Id.*
[61] Forbath, *supra* note 12, at 774–75.
[62] ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 104 (1980).
[63] STANLEY, *supra* note 15, at 2.

slave, I would prefer to be the slave of one man, rather than a slave of a soulless corporation, or the slave of a state."[64]

Unlike the moral abolitionists, these activists sympathized with the northern labor movement and sought to align themselves with that movement in the antislavery effort.[65] As Indiana Representative George Julian explained, to them, the labor question was "the 'logical sequence of the slavery question.' "[66] Massachusetts Senator Henry Wilson connected the oppression of slaves to white laboring men, "we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country."[67] These advocates—all leaders in the Reconstruction Congress—looked not only to the experience of slaves, but also to that of northern workers as they developed their own vision of liberty of contract.

B. Slaves and Free Blacks

Because most slaves were illiterate, and because of the overwhelming oppression that they faced, we know little of how slaves envisioned what free labor would be like. When they made it into free states, however, they found allies who helped them to express their views.[68] Sometimes, they chose, or were forced, to appear in court.[69] Some slaves sued voluntarily for their freedom.[70] Others were kidnapped by slave catchers and fought their rendition in hearings before United States magistrates.[71] They also sought government protection from the free states into which they escaped.[72] Northern states responded with personal liberty laws that established procedural protections for those accused of being fugitives and imposed kidnapping charges on slave catchers who sought to return them to bondage.[73]

Some fugitive slaves did have the opportunity to speak about what they expected from freedom.[74] When fugitive slaves spoke, they frequently invoked

---

[64] DUPLICATE COPY OF THE SOUVENIR FROM THE AFRO-AMERICAN LEAGUE OF TENNESSEE TO HON. JAMES M. ASHLEY OF OHIO 622 (Benjamin W. Arnett ed., 1894).

[65] *See* ZIETLOW, *supra* note 18, at 55–56.

[66] *See* STANLEY, *supra* note 15, at 61.

[67] CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866); *see also* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 440 (1989).

[68] BLACKETT, *supra* note 33, at *passim*.

[69] *See* LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT 5, 28 (2014).

[70] *Id.* at 5.

[71] *Id.* at 71−72. *See, e.g.*, BLACKETT, *supra* note 33, at 52–53.

[72] *Id.* at 42.

[73] *See id.* at 36, 75 (referring to the personal liberty laws passed by Northern states, including laws that imposed kidnapping penalties on slave catchers).

[74] *See generally* CRAFT, *supra* note 37, at 93; J. W. C. PENNINGTON, A NARRATIVE OF EVENTS OF THE LIFE OF J.H. BANKS, AN ESCAPED SLAVE, FROM THE COTTON STATE, ALABAMA, IN AMERICA 68–69 (1861); SAMUEL RINGGOLD WARD, AUTOBIOGRAPHY OF A

both the Declaration of Independence and its promise of liberty.[75] For example, escaped slave William Craft explained that he fled enslavement because, he heard the words of the Declaration of Independence were "that all men are created equal; that they are endowed by their Creator with certain inalienable rights . . . we could not understand by what right we were held as 'chattels.' "[76] "Therefore," Craft said, "we felt perfectly justified in undertaking the dangerous and exciting task of 'running a thousand miles' in order to obtain those rights which are so vividly set forth in the Declaration."[77] A fugitive slave named Jerry agreed, pleading "in the name of the Declaration of Independence . . . do break these chains, and give me the freedom which is mine because I am a man, and an American."[78] These fugitive slaves took the Declaration of Independence literally and demanded liberty in its most concrete terms.

Fugitive slaves also articulated their own doctrine of free labor. Escaped slave J. H. Banks said:

> The slaves, moreover, not only desire, but they look confidently for the day of their emancipation. Nor do they expect when free to spend their time in idleness. They all know they will have to work, but like other men they wish to have the benefit of the labour of their hands. . . . Treat the labourers kindly, as men whom they have wronged, pay them fairly and not grudgingly, and all will go well.[79]

Francis Fedric agreed, "Jus give me my freedom, and pay me for my work, and I work for my massa from daylight till dark."[80] These fugitive slaves looked forward to the day when they could enjoy the fruit of their own labor.[81]

Meanwhile, free blacks asserted their own rights claims, organizing mass protests against the 1850 Fugitive Slave Act and crowding courtrooms in which accused fugitives were being tried.[82] People in free black communities in cities such as Boston, Chicago, and Cincinnati resolved to resist the 1850 Fugitive Slave Act.[83] They assisted fugitive slaves, and many joined the Underground

---

FUGITIVE NEGRO: HIS ANTI-SLAVERY LABOURS IN THE UNITED STATES, CANADA, & ENGLAND 22–23 (1855).

[75] CRAFT, *supra* note 37, at iii.

[76] *Id.*

[77] *Id.*

[78] WARD, *supra* note 74, at 120.

[79] PENNINGTON, *supra* note 74, at 90–91.

[80] FRANCIS FEDRIC, SLAVE LIFE IN VIRGINIA AND KENTUCKY; OR, FIFTY YEARS OF SLAVERY IN THE SOUTHERN STATES OF AMERICA 67 (1863).

[81] Members of the Reconstruction Congress often referred to the right to the "fruit[] of one's labor" during Reconstruction debates to refer to the right to free labor. *See* VanderVelde, *supra* note 67, at 460 n.102; KERSCH, *supra* note 11, at 141.

[82] *See* BLACKETT, *supra* note 33, at 67.

[83] *Id.* at 162.

Railroad.[84] They also formed organizations and asserted rights claims through official declarations.[85]

In 1862, noted abolitionist and escaped slave Frederick Douglass published an essay, "What Shall Be Done With the Slaves if Emancipated?" In that essay, Douglass opined, "[o]ur answer is, do nothing with them; mind your business, and let them mind theirs. Your *doing* with them is their greatest misfortune."[86] Douglass continued, "Let us stand upon our own legs, work with our own hands, and eat bread in the sweat of our own brows."[87] Here, Douglass insisted that blacks would work hard and succeed if they were allowed to do so.[88] Conservatives cite this essay to claim that Douglass opposed all government assistance for freed slaves.[89] But this argument takes Douglass's language out of context. Douglass anticipated, correctly, that southern states would enact laws restricting the rights of freed slaves.[90] At the time, Douglass could not have imagined that legislatures would enact measures to *help* freed slaves. Here, Douglass opposed laws that would impose burdens on freed slaves, not laws that would help them.

Two years later, in October 1864, Douglass expressed a more optimistic view of the power of the state to aid freed slaves. Douglass participated in the Colored National Convention assembled in Rochester, New York along with other noted black abolitionists, and joined the conference's declaration that "[a]s a people, we have been denied the ownership of our bodies, our wives, homes, children, and the product of our own labor."[91] The declaration continued,

> [A]s citizens of the Republic, we claim the rights of other citizens. We claim that . . . proper rewards should be given for our services, and that [all] the immunities and privileges of all other citizens and defenders of the nation's honor should be conceded to us . . . . and we claim our fair share of the public domain, whether acquired by purchase, treaty, confiscation, or military conquest.[92]

These black activists made it clear that, at a minimum, they expected that free blacks, including freed slaves, would enjoy the right to contract. However,

---

[84] *See id.* at 189–91.

[85] *See, e.g.*, *Address of the Colored National Convention to the People of the United States*, *in* THE RECONSTRUCTION AMENDMENTS (13TH, 14TH & 15TH): ESSENTIAL DOCUMENTS, *supra* note 13, at 204.

[86] Frederick Douglass, *What Shall be Done with the Slaves if Emancipated?*, DOUGLASS' MONTHLY, Jan. 1862.

[87] *Id.*

[88] *Id.*

[89] *See* Grutter v. Bollinger, 539 U.S. 306, 349–50 (2003) (Thomas, J., dissenting).

[90] *See infra* text accompanying notes 142–48 (showing that laws enacted by southern states immediately after the abolition of slavery, known as the Black Codes, proved that Douglass was correct).

[91] *Declaration of Wrongs and Rights*, *in* PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, *supra* note 39, at 41; *id.* at 3 (noting Oberlin Ohio's John Langston also attended the convention).

[92] *Id.* at 41.

they insisted that they would not be satisfied with "personal freedom," including "the right to own, buy, and sell real estate."[93] They demanded the right to vote and participate in the political process and called for "the blessings of equal liberty"—that the government would protect their rights.[94]

C. Northern Workers and Freedom of Contract

Slaves were not the only unfree workers in antebellum America. Indentured servants were also bound to their masters.[95] However, indentured servants were not slaves and were treated as persons with the right to form family relationships and enter into contracts (however unconscionable the contract may be) with their masters.[96] Unlike slaves, indentured servants were not bound to their masters for life.[97] Unlike slaves, indentured servants were paid wages, though those wages were very low.[98] However, there were significant similarities between indentured servitude and slavery. Like slaves, indentured servants had few legal rights, and lacked mobility and control over their lives.[99] Like slaves, most indentured servants wanted to leave servitude and achieve autonomy.[100] Indentured servants' right to enter into exploitative one-sided contracts did little to improve their lives.

As antislavery activists developed an ideology of free labor, they considered the meaning of liberty of contract for slaves and northern workers. During the revolutionary era, opponents of slavery had differentiated indentured servitude from slavery on the ground that indentured servants voluntarily contracted with their masters.[101] They believed that the fact that the servants had entered into their contracts voluntarily was sufficient to make them free.[102] However, by the 1820s, antislavery and labor activists began to argue that both slavery and indentured servitude should be abolished.[103] They came to believe "that labor became involuntary the moment a laborer decided to depart and was not

---

[93] *Id.* at 59.

[94] *Id.* at 47, 59.

[95] STEINFELD, *supra* note 4, at 7.

[96] *See id.* at 13 (noting that the key differences between indentured servitude and slavery was that ordinary service was undertaken voluntarily but slavery was not, and that service was temporary, but slavery was permanent).

[97] *Id.* at 11.

[98] *Id.*

[99] *See id.* at 111.

[100] *Id.* at 123.

[101] *See id.* at 13 (explaining that during the American revolutionary era, many Americans opposed slavery, but thought indentured servitude was okay because indentured servitude was based on a contract).

[102] *See* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1483–84 (2010) (discussing the differing interpretations of involuntary servitude as applied to indentured servants between Indiana and Illinois courts).

[103] STEINFELD, *supra* note 4, at 160.

permitted to do so."[104] As a result of this activism, by the 1850s, "contractual servitude was lumped together with slavery by free labor proponents as a form of involuntary servitude."[105] Thus, the antislavery movement in the early Nineteenth Century contributed to decline of indentured servitude in the United States.

The evolution towards a doctrine of free labor coincided with the early industrial revolution in the United States, which changed the structure of labor and altered workers' expectations.[106] Before the industrial revolution, workers were largely artisanal and farmworkers, who hoped to someday own their own business or farm.[107] Factory workers had no such illusion—they would likely work for wages their entire lives.[108] By and large, industrial workers were no longer bound contractually to their employer, as indentured servants were.[109] Instead, they depended on wage labor for their livelihood.[110] Industrial workers realized that they could not stop the degradation of work so they sought to "mitigate its [] effects" with campaigns for the legal regulation of hours and conditions of work.[111] Their first priority was legislation limiting their hours of work.[112]

The birth of industrialization also marked the beginning of the northern labor movement.[113] Like the leaders of the antislavery movement, labor leaders were inspired by the Declaration of Independence and often cited it to support their claims for workers' rights. Invoking their claims, New York City Democrat Tommy Walsh, who had strong ties to the labor movement, claimed that the Declaration "guaranteed every person who was willing to labor the right to do so."[114] Labor leaders also developed their own vision of freedom of contract and explored what the promise of liberty would mean to northern workers.[115]

The antebellum labor movement's primary goal was an eight-hour workday so they could have more control over their lives.[116] The eight-hour movement posed a challenge to advocates for liberty of contract. A law that limited the workday to eight hours interfered with the worker's liberty to contract for a

---

[104] *Id.* at 147.
[105] *Id.* at 178.
[106] TOMLINS, *supra* note 41, at 328.
[107] *See* MONTGOMERY, *supra* note 13, at 14.
[108] *See id.* at 26.
[109] *See* STEINFELD, *supra* note 4, at 148.
[110] *See id.*
[111] TOMLINS, *supra* note 41, at 328–29.
[112] *Id.* at 153, 328.
[113] *See id.* at 153.
[114] SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850 332 (1984).
[115] MONTGOMERY, *supra* note 13, at 233.
[116] *Id.* at 186.

longer work day.[117] Abolitionists were generally suspicious of the northern labor movement and opposed legislation that would interfere in the bargain between a worker and his employer.[118] However, antislavery republicans sought alliances with the labor movement, and viewed the right to contract not as a goal in and of itself, but a means to achieve full freedom for workers.[119] While antislavery republicans did not embrace the eight-hour movement prior to the Civil War, they did not view the right to contract as precluding such regulation.

The meaning of free labor itself was evolving in the decades leading up to the Civil War. Under the ideology of civic republicanism, freedom entailed the ownership of property.[120] Workers were not free unless they worked for themselves.[121] Many members of the Free Soil, Free Labor Party also championed the dignity and opportunities of free labor, social mobility and "progress."[122] They valued materialism, social fluidity and the "self-made man."[123] According to historian Christopher Tomlins, "[t]o the antebellum labor movement, free labor ideally meant economic independence through the ownership of productive property, or proprietorship."[124] This was "a far more substantive conception of contractual freedom . . . [that] the abstract formalism of mere self-ownership would allow."[125] Labor activists argued that state intervention was necessary to protect workers from exploitation and enable them to exercise a meaningful right to contract.[126]

Some northern labor activists argued that northern workers were "wage slave[s]."[127] They argued that working for wages was as bad as slavery.[128] Because like slaves, wage workers depended on another person for their livelihood.[129] Walsh explained that "the liberty of the white worker was only such liberty as the employer chose to extend to him."[130]

---

[117] Lochner v. New York, 198 U.S. 45, 53 (1905) (showing that the Court relied on this reasoning to strike down a similar law).

[118] MONTGOMERY, *supra* note 13, at 267; Forbath, *supra* note 12, at 784.

[119] ZIETLOW, *supra* note 18, at 62; *see* Forbath, *supra* note 12, at 768–69.

[120] *Id.* at 769.

[121] *See* MONTGOMERY, *supra* note 13, at 14.

[122] FONER, *supra* note 14, at 15–16.

[123] *Id.* at 16; FONER, *supra* note 62, at 64.

[124] TOMLINS, *supra* note 41, at 289.

[125] *Id.*

[126] *See* MONTGOMERY, *supra* note 13, at 246–47.

[127] *Id.* at 30.

[128] *Id.* at 26, 30; Forbath, *supra* note 12, at 776.

[129] FONER, *supra* note 14, at 17; MONTGOMERY, *supra* note 13, at 30 ("Americans associated liberty with the ownership of productive property." This was the opposite of "wage slavery."); *Id.* at 238–39 ("[T]he worker, had in effect, delivered himself into . . ." This was the concept of "wage slavery."); WILENTZ, *supra* note 114, at 332 (quoting Tommy Walsh who said "wage slavery and the tyranny of capital had reduced republican producers to dependent menials.").

[130] ZIETLOW, *supra* note 18, at 54; *see also* Williston H. Lofton, *Abolition and Labor: Appeal of the Abolitionists to the Northern Working Classes*, 33 J. NEGRO HIST. 249, 266

Over time the argument that working for wages was tantamount to slavery became increasingly problematic. The economy was industrializing, and by 1870 two-third of productive U.S. workers were earning wages.[131] Labor reformers thus began to redefine "wage slavery" to reflect the plight of northern industrial workers who worked long hours under poor conditions.[132] They sought government regulations to protect workers from wage slavery and formed "eight-hour" leagues to demand laws limiting the length of working days.[133] Notable labor activist Ira Steward said, "the anti-slavery idea . . . was, that every man had a right to come and go at will. The labor movement asks how much this abstract right is actually worth, without the power to exercise it."[134] A Massachusetts bootmaker stated that working only eight hours made him feel "full of life and enjoyment" because "the man is no longer a *Slave*, but a man."[135] Historian David Montgomery said: "The struggle for shorter hours, in other words, was seen as a fight for the liberty of the worker."[136] These labor activists understood that government regulation was necessary to secure liberty for workers.

Thus, in the years leading up to the Civil War, fugitive slaves, free blacks, antislavery advocates and labor advocates all championed an ideology of free labor. Freedom of contract was a crucial prerequisite to attaining free labor but recognizing a formal right to contract alone was not sufficient. All of these activists called on the state to engage in protecting their right to free labor by not only abolishing slavery but also legislating for workers' rights.

(1948). Some northern labor activists argued that the plight of northern workers was worse than that of slaves. WILENTZ, *supra* note 114, at 333. For example:

> An 1845 declaration of the National Reform Association (NRA) argued that wage slaves were more oppressed than chattel slaves, because unlike slaves, wage-earners had no one to care for them. Southern defenders of slavery eagerly seized on labor's critique of the plight of the northern worker. They emphasized the obligation of slave owners to care for their slaves. For example, noted South Carolina Senator John Calhoun claimed that "the liberty of the northern wage earner . . . amounted to little more than the freedom to sell his labor for a fraction of its value, or to starve."

ZIETLOW, *supra* note 18, at 54–55; *see also* GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY 226–27 (1854). Abraham Lincoln carefully read *Sociology for the South*. FONER, *supra* note 14, at 65.

131 *See* MONTGOMERY, *supra* note 13, at 26, 28–29.

132 *See id.* at 30; WILENTZ, *supra* note 114, at 332 (quoting Tommy Walsh who said "[n]o man devoid of all other means of support but that which his labor affords him can be a freeman, under the present state of society. He must be a humble slave of capital.").

133 MONTGOMERY, *supra* note 13, at 179 (eight hour work day movement goal was to make workers "masters of their own time."); *Id.* at 238 (Fincher's Trade Review masthead said, "Eight Hours: A Legal Day's Work for Freemen."); *Id.* at 237 (making analogies to slavery).

134 *Id.* at 251.

135 *Id.* at 238.

136 *Id.*

II. FREED SLAVES AND NORTHERN WORKERS AFTER THE CIVIL WAR

The Civil War was the catalyst that brought about the end of slavery and the beginning of free labor. In attempting to enforce the rights of free slaves and aid them in their transformation to a system of free labor, the Reconstruction Congress faced a daunting task. Michigan Senator Jacob Howard described the experience of slaves who had just been liberated by the Thirteenth Amendment during the debates over the 1866 Civil Rights Act.[137] Senator Howard said:

> What is a slave in contemplation of American law, in contemplation of the laws of all of the slave States? We know full well . . . he had no rights nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend. He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent or inheritance. He did not own the bread he earned and ate. He stood upon the face of the earth completely isolated from the society in which he happened to be . . . .[138]

There, Howard described the central nature of slavery—slaves were not treated as human beings but as property, bought and sold at the market and unable to engage in the market on their own. Slaves were denied the right to familial relations, isolated and bereft of family or friends.[139] Slaves lacked any legal rights, notably including the right to travel, to testify in court, or to enter into contracts.[140] They lacked any control whatsoever over their own lives and were subject to virulent racism and racially motivated terrorism.[141] Freed slaves desperately needed an active state to protect their new right to contract.

During the summer of 1865, southern states reluctantly ratified the Thirteenth Amendment but resisted its effect by enacting laws, known as Black Codes, which denied the liberty of contract to the newly freed slaves.[142] Southern states used the Black Codes to impose indentured servitude on freed slaves and under the Black Codes, Black workers had to enter into year-long contracts by mid-January each year.[143] Under the Codes, the doctrine of specific performance applied to the labor contracts, so freed slaves could not leave exploitative employers during the duration of their contracts.[144] Many of the Black

---

137 CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard).

138 *Id.*

139 *See id.*

140 *See* Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1027 (1993).

141 *See* Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, *in* SLAVERY & THE LAW 209, 222 (Paul Finkelman ed., 1997).

142 *See* MONTGOMERY, *supra* note 29, at 120.

143 *Id.*

144 *Id.*

Codes required artisans to seek annual licenses from district courts and subjected them to penalties if they quit their jobs.[145]

Black Codes also created a new class of indentured servants by requiring state courts to bind out orphans to work for employers chosen by the courts. State courts were also authorized to bind out children who were not orphans if the judge found that their parents lacked the means to care for them.[146] Southern state officials also used vagrancy laws and apprenticeship systems to control the black labor force, and imposed criminal penalties on non-compliant workers.[147] These laws imposed a system of legally compelled labor on newly freed slaves, effectively perpetuating slavery.[148]

After slavery was abolished, freed slaves discussed what they hoped to obtain from freedom. The Black Codes made it clear that freed slaves' transition to freedom would not be easy, and that they would require federal intervention to help them. Freed slaves explained that freedom from regulation was simply inadequate to remedy the harm that slavery had wrought. Slaves did not merely lack personal liberty. Their lack of liberty enabled masters to exploit them and treat them poorly without any consequences. The slaves' lack of mobility and autonomy enabled the master to treat them as less than a human being. To remedy this harm, freed slaves called on the government to help them.

Northern workers had been crucial to the victorious effort of the Union Army.[149] After the War, they hoped that the end of chattel slavery would also improve their plight. Like the freed slaves, they called on an active state to ensure that they could exercise a meaningful liberty of contract.[150]

A. Freed Slaves

On November 20, 1865, leaders of the newly free black community in South Carolina convened a Colored People's Convention "for the purpose of deliberating upon the plans best calculated to advance the interests of our people."[151] "After five days of deliberation, this convention of newly freed slaves issued a resolution calling for the end of race discrimination, the right to vote, the right to equal citizenship, and the repeal of laws that reduced free slaves to 'serfdom.'"[152] Above all else, freed slaves wanted independence from white control.[153] They also wanted government redistribution of farm land, with some

---

[145] *Id.*

[146] *Id.*

[147] FONER, *supra* note 62, at 127.

[148] STEINFELD, *supra* note 4, at 171.

[149] MONTGOMERY, *supra* note 13, at 92.

[150] *See id.* at 91, 101, 107, 135.

[151] PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA 1 (1865); *see also* ZIETLOW, *supra* note 18, at 8.

[152] ZIETLOW, *supra* note 18, at 8.

[153] FONER, *supra* note 62, at 107.

claiming that they earned the right to their former owner's land.[154] Freed slaves also resisted the "slave crop," cotton.[155] They wanted autonomy—the ability to own their own land and choose their own crops.[156] They valued freedom of movement above higher wages and sought to work less than they had as slaves.[157] Freed slaves sought government protection of their fundamental human rights, protection which they saw as necessary to guarantee their autonomy.

According to historian Eric Foner, many former slaves saw freedom as an end to the "separation of families, punishment by the lash, [and] denial of access to education."[158] Others stressed that freedom meant the enjoyment of "our rights in common with other men."[159] The right to contract was a necessary precondition to freed slaves' transition from slavery to freedom. According to the Conference report, Black Codes deprived them of "the right to engage in any legitimate business" and charged that the legislature "g[ave] us no little or no encouragement to pursue agricultural pursuits, by refusing to sell [] us lands" and adopted laws that would "thrust us out or reduce us to a serfdom."[160] These newly freed slaves asserted the right "to enter upon all the avenues of agriculture, commerce, [and] trade . . ."[161] They demanded action to protect them from the southern Black Codes that limited their freedom, including their liberty of contract.

Freed slaves wanted to be treated as full citizens, with suffrage rights, and they asked the federal government to protect them in the exercise of those rights. For example, the South Carolina Conference called for "a code of laws for the government of *all*, regardless of color" and demanded "the establishment of good schools for the thorough education of our children."[162] Thus, the freed people of South Carolina asked for the same right to contract as enjoyed by white men, but they also asked for government protection to exercise that right. They called for the federal government to "continue the Freedmen's Bureau until such time as we are fully protected in our persons and property by the laws of the State."[163] Abstract rights alone were insufficient to meet their needs.

---

[154] Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 871 (1987); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 32 (1999).

[155] FONER, *supra* note 62, at 108.

[156] *See id.*

[157] *Id.* at 107.

[158] Foner, *supra* note 154, at 870.

[159] *Id.*

[160] *Id.*

[161] *Memorial to the Senate and House of Representatives of the United States, in Congress Assembled*, *in* PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 151, at 30, 31.

[162] PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 151, at 9, 22.

[163] *Id.* at 20.

The measures enacted by southern state legislatures during early Reconstruction, when Union troops protected the freed slaves' right to vote, provide another insight into the vision of liberty of contract held by freed slaves.[164] Those legislatures promoted economic empowerment for freed slaves with measures that sometimes also benefited poor southern whites.[165] According to Foner, "[i]n our preoccupation with the racial politics of Reconstruction[,] we may have overlooked the first stirring of class politics within the white community."[166] Towards the end of the Civil War, the Union-occupied city of New Orleans adopted pro-labor policies along with measures protecting the civil and voting rights of newly freed slaves.[167] In 1864, the Louisiana state legislature established a progressive income tax, proclaimed a nine-hour workday, and a minimum wage.[168] These early Reconstruction measures sought to regulate the right to contract by establishing rights for all workers.

After the war, returning confederates used force to take over the Louisiana government and repealed the progressive measures of the Union-led government.[169] However, in other southern states, northern troops enforced blacks' right to vote, and they elected similarly progressive governments.[170] Black legislatures pushed for laws granting agricultural laborers a lien on their own crops.[171] Many southern states enacted those laws as well as progressive tax policies and laws making it illegal to fine planters for political reasons.[172] Some local officials "actively sympathized with the economic plight of the [B]lack laborer."[173] During radical Reconstruction, state governments prioritized the needs of poor people and increased tax burdens on the rich.[174] In 1870, a South Carolina Black political leader claimed that "the Republican Party is emphatically the poor man's party . . . . We favor laws to foster and elevate labor . . . ."[175] These black Republicans sought to redefine the law of labor to protect both the rights of freed slaves and the white working class, using liberty of contract to establish a free labor system in the southern states.

B. Northern Workers

After the Civil War, black workers in the south and white workers in the north shared concerns about a lack of control over the workplace. In the south,

---

164 *See* FONER, *supra* note 62, at 114–15.
165 *See id.*
166 *Id.* at 114.
167 *See* MONTGOMERY, *supra* note 13, at 115.
168 *Id.*
169 *Id.* at 116.
170 *See* FONER, *supra* note 62, at 114.
171 *Id.*
172 *Id.*
173 *Id.* at 115.
174 *Id.* at 116.
175 *Id.*

former slaves preferred to own their own land and farm their own crops.[176] In the north, workers preferred to own their own business, or at least have some say in the operation of their business.[177] In this way, the interests of these workers coincided, as did the economic barriers that they faced. The issue of debtor relief, which also affected small white planters, plagued the early years of Reconstruction.[178] In the post-Civil War north, workers were experiencing a decline in control over their conditions of work. The foreman, not the workers themselves, controlled the industrial workplace.[179] The abolition of chattel slavery had not stopped antebellum arguments about wage slavery.

According to historian Amy Dru Stanley, "[t]he wage slave symbolized selling oneself, evoking fears that the self entitlement at the heart of contract freedom had been lost."[180] Ira Steward, machinist and head of the Eight Hour League, claimed that, just as the "motive for making a man a slave, was to get his labor, or its results, for nothing," so the "motive for employing wage-labor, is to secure *some* of its results for nothing; and, in point of fact, larger fortunes are made out of the profits of wage-labor, than out of the products of slavery."[181]

Steward explained that within the system of wage labor, "freedom of contract," which ostensibly existed between employer and employee, was "necessarily a sham" because of the power imbalance between workers and their employers.[182] As it was before the war, the northern labor movement's primary post-war goal was to obtain legislation limiting the hours of work.[183] Steward promoted "the omnipotent power of the people when acting in their *collective capacity*" to enact legislation limiting the workday to eight hours.[184] Numerous labor organizations called for an eight-hour work day.[185] Post-war labor activity peaked in 1867, with a wave of strikes demanding an eight-hour work day.[186]

The demands of the northern labor movement directly pitted the workers' substantive vision of freedom of contract against the liberal ideology. Spokesmen for labor, such as Ira Steward, sought legislation to enhance the workers'

---

176 *Id.* at 108.

177 *See* MONTGOMERY, *supra* note 13, at 178.

178 FONER, *supra* note 62, at 113.

179 STANLEY, *supra* note 15, at 66–67.

180 *Id.* at 84.

181 Ira Steward, *Poverty*, *in* FOURTH ANNUAL REPORT OF THE [MASS.] BUREAU OF STATISTICS OF LABOR 411, 411 (1873).

182 *See* MONTGOMERY, *supra* note 13, at 252.

183 *Id.*

184 *Id.* (quoting Letter of Ira Steward, Daily Evening Voice (Jan. 17, 1867)).

185 For example, in 1866 a bricklayer's convention called for an eight-hour workday and educational centers for labor unions. *Id.* at 175. In August 1866 the National Labor Union called for an eight-hour work day, formation of co-ops and the unionization of workers, including Black workers. *Id.* at 176–77. In the state of Massachusetts, labor leaders sought to convert the Republican Party to an eight-hour agenda. *Id.* at 265.

186 FONER, *supra* note 62, at 144.

bargaining power.[187] Other advocates for labor disagreed.[188] The hardest hurdle to cross in the battle for the eight-hour day was "reluctance to interfere with freedom of contract."[189] Edwin L. Godkin, editor of *The Nation* and the former voice of radicalism, fiercely opposed the eight-hour movement because it would interfere with the freedom of contract.[190] Godkin argued that eight-hour laws would interfere with the natural price of labor and would lessen production.[191] Godkin provoked fierce opposition from readers, but he was very influential.[192]

Employers also wanted written contracts known as "iron-clad" agreements, which ban employees from joining unions and striking.[193] Labor advocates agreed that these agreements were an "unfree" jail of labor.[194] "[N]orthern workers argued that contracts barring collective acts were enslaving."[195] They pointed out the inequality in offer and acceptance, and exchange of labor for wage, and argued that "the blunt terms of free contracts were expressions of wage slavery."[196] Thus, labor activists disagreed about liberty of contract but many sought an active state to protect that right.[197]

III. LIBERTY OF CONTRACT IN THE RECONSTRUCTION CONGRESS

Newly freed slaves and northern workers sought measures to empower themselves in the workplace. They sought liberty of contract, but with the understanding that government involvement was needed to make it meaningful.[198] All of these workers sought the protection of an active state to help them earn a fair wage and protect them against undue exploitation. In the south, freed slaves sought government protection against racial discrimination and racialized violence.[199] In the north, workers sought government measures that would limit their working hours.[200] All of these workers called for government regulation that was necessary for them to enjoy liberty of contract, and the Reconstruction Congress responded.

---

187 STANLEY, *supra* note 15, at 111.
188 *See* MONTGOMERY, *supra* note 13, at 247.
189 *Id.*
190 *Id.* at 247–48.
191 *Id.* at 248.
192 *Id.*
193 STANLEY, *supra* note 15, at 68.
194 *Id.* at 69.
195 *Id.*
196 *Id.* at 69–70.
197 *See* MONTGOMERY, *supra* note 13, at 252.
198 *See, e.g.*, *id.* at 117, 233.
199 *See Address of the Colored State Convention to the People of the State of South Carolina*, *in* PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 151, at 24–26.
200 *See* MONTGOMERY, *supra* note 13, at 186.

There is evidence to support that the view of scholars who argue that the formal right to contract, adopted by the Supreme Court in *Lochner v. New York* and other cases, has its roots in the Reconstruction Era.[201] It is indisputable that freedom of contract is a necessary precondition of free labor, and central to the Reconstruction effort. As we have seen, the moral abolitionist strand of the antislavery movement advanced a formalist model of liberty of contract.[202] That model influenced federal officials working in the Freedmen's Bureaus to establish a system of free labor for the newly freed slaves.[203] Moreover, it is also true that some Freedmen's Bureau officials fetishized contract over the substantive protections that freed slaves needed.[204]

However, the vast majority of the Reconstruction Congress did not share the formal view of liberty of contract that the moral abolitionists advocated for. They understood that individual liberty of contract alone was insufficient to ensure that freed slaves would enjoy the fundamental rights of free persons. The leaders of the Reconstruction Congress wanted more than merely abolishing slavery and establishing a formal right to contract. Merely liberating slaves was not sufficient to improve their status because they were vulnerable to their former masters.[205] Moreover, leaders of that Congress—including James Ashley, George Julian, and Henry Wilson—had long linked the plight of slaves to that of northern workers, viewing the end of slavery as just one step in the fight for workers' rights.[206] Despite the fact that landmark Reconstruction measures were precisely the type of regulations that the Supreme Court struck down as violating the liberty of contract during the *Lochner* Era, Reconstruction Era debates over those measures are remarkably bereft of any mention of liberty of contract. With few exceptions, members of the Reconstruction did not view freedom of contract as an end in itself; they saw freedom of contract as a means towards their goal of establishing equal citizenship and fundamental rights for freed slaves and empowering all.

A. The Historical Case for Lochnerian Liberty of Contract

Until now, scholars have largely assumed, to the extent that there is a Reconstruction based liberty of contract, that liberty of contract limits government regulation of contracts. Articulating this view, Randy Barnett argues that the liberty of contract adopted by the Supreme Court in *Lochner v. New York* was based in abolitionist principles of free labor.[207] "The right to one's labor was

---

[201] *See* David N Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 222–23 (2009).

[202] *See supra* notes 54–60 and accompanying text.

[203] *See* DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 1865-1868 156 (1979).

[204] *Id.* at 158.

[205] *See id.* at 157.

[206] *See* ZIETLOW, *supra* note 18, at 6, 65; VanderVelde, *supra* note 67, at 438.

[207] BARNETT, *supra* note 8, at 214.

one's own, they argued, and could be alienated only by consent."[208] To support this argument, Barnett points out that "slavery was, first and foremost, an economic system that was designed to deprive slaves of their economic liberty."[209] According to Barnett, "The Thirteenth Amendment prohibited slavery and *the opposite of slavery is liberty*."[210] Therefore, "[a]ny unwarranted restrictions on liberty—whether personal or economic—are simply partial 'incidents' of slavery" that fall within Congress's regulatory power under the Thirteenth Amendment.[211] Thus, "the Thirteenth Amendment empowered Congress to protect the economic system of free labor and the underlying rights of property and contract that defined this system."[212]

Ken Kersch agrees with Barnett that the Reconstruction Era right to contract limits governmental authority to regulate employment contracts.[213] Both scholars rely heavily on the dissenters in the iconic *Slaughterhouse Cases*.[214] In that case, a group of butchers challenged a New Orleans ordinance that largely restricted them from conducting business inside the city limits.[215] The butchers sued under the Thirteenth and Fourteenth Amendments, claiming that the law infringed on their constitutional right to practice the profession of their choice.[216] The majority of the Court rejected their challenge, but four justices dissented.[217] In his dissent, Justice Field argued that the law violated the butchers' "right of free labor, one of the most sacred and imprescriptible rights of man."[218] Justice Bradley made a similar argument, insisting that the "right to choose one's calling is an essential part of that liberty which it is the object of government to protect . . . . Without this right he cannot be a freeman."[219] Justice Swayne's dissent described the liberty to pursue an occupation to be a fundamental right closely related to free labor.[220] In the next decades, other Justices applied the same reasoning to the Due Process Clause.[221]

In their dissents to *Slaughterhouse*, Field and Bradley—Lincoln and Grant appointees, respectively—articulate a broad, anti-regulatory view of freedom of contract for workers.[222] Kersch and Barnett are correct that Field's and Bradley's opinions reflected the moral abolitionists' view of a formalist right to con-

---

208 *Id.* at 205.
209 Barnett, *supra* note 27, at 8.
210 *Id.* at 9.
211 *Id.*
212 *Id.*
213 *See* KERSCH, *supra* note 11, at 141–42.
214 *Id.* at 141; BARNETT, *supra* note 8, at 197–98.
215 The Slaughter-House Cases, 83 U.S. 36, 57, 59 (1872).
216 *Id.* at 58–59.
217 *Id.* at 69, 80–81; *id.* at 111 (Field, J., dissenting).
218 *Id.* at 110.
219 *Id.* at 116 (Bradley, J., dissenting).
220 *Id.* at 126–27 (Swayne, J., dissenting).
221 BARNETT, *supra* note 8, at 210.
222 *See* KERSCH, *supra* note 11, at 141.

tract.[223] The influence of that view can be seen in the efforts of Freedmen's Bureau officials to establish a system of free labor in the early Reconstruction Era.[224] Those officials used the formal right to contract as a model as they sought to establish a system of free labor.[225] However, the dissents in *Slaughterhouse* articulate only one strand of free labor ideology from the antebellum and Reconstruction Era.[226] As we have seen, other antislavery activists viewed liberty of contract more broadly, not as defining free labor, but as a means to achieve free labor.[227] From Tom Paine to Abraham Lincoln, "freedom entailed ownership of productive property."[228] For freed slaves who could not afford property, and wage workers of all races, freedom of contract came to mean the right to be free of undue coercion in the workplace.[229] With the Thirteenth Amendment, the Reconstruction Congress embraced this view by abolishing not only slavery, but also involuntary servitude.[230] Enforcing that Amendment, that Congress regulated workers' right to contract to establish a system of free labor.

In *Slaughterhouse*, an opinion written by Lincoln appointee Justice Samuel Miller, the Court rejected the argument that the Reconstruction Amendments protected the butcher's right to practice their trade and upheld regulations that have been imposed by the Reconstruction government.[231] While Justice Miller's opinion in *Slaughterhouse* has been justly criticized by numerous scholars for its narrow interpretation of the Fourteenth Amendment's Privileges or Immunities Clause,[232] the ultimate ruling upholding a health and safety regulation was consistent with the views of the vast majority of the Reconstruction Congress that legislatures could regulate the right to contract. Like Justice Miller, a majority of the Reconstruction Congress embraced regulation and rejected a formalist right to contract.

B. Freedmen's Bureaus and the Formalist Right to Contract

In 1865, the pressing question for the Reconstruction Congress was how to establish a system of free labor for the newly freed slaves that would be free of undue coercion.[233] In the south, employers and employees had to adjust to their

---

[223] *See* Forbath, *supra* note 12, at 786 (acknowledging that the right to freely sell one's labor was indeed the core of the abolitionist "utopian constitutionalism.").

[224] NIEMAN, *supra* note 203, at 158.

[225] *Id.*

[226] *See* Forbath, *supra* note 12, at 768.

[227] *See supra* notes 62–69 and accompanying text.

[228] Forbath, *supra* note 12, at 769.

[229] *See id.* at 802.

[230] U.S. CONST. amend. XIII.

[231] *See* The Slaughter-House Cases, 83 U.S. 36, 57, 80–81 (1872).

[232] *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 63, 99–100 (1993).

[233] FONER, *supra* note 62, at 99.

new status of bargaining contracts.[234] Many northerners believed that to be free meant to be free to work, and freed slaves yearned to work for themselves—not their former masters.[235] Yet southern Black Codes and vagrancy laws limiting the mobility of freed slaves forced many of them to do exactly that.[236] The Reconstruction Congress sought to protect Black labor from the most exploitative conditions in the south by creating Freedmen's Bureaus which would enforce liberty of contract on the ground.[237] Freedmen's Bureau officials had the power to implement the new free labor paradigm in the south by protecting the freed slaves' right to seek employment wherever they desired and enter into free and fair contracts with their employers.[238]

Unfortunately, President Lyndon B. Johnson simply did not execute many of Congress's Reconstruction measures.[239] The president not only vetoed the Freedmen's Bureau Act, but he also used his executive authority to limit the effectiveness of Bureau officials after Congress overrode his veto.[240] President Johnson's hostile attitude towards Reconstruction created tension between him and members of Congress, eventually sparking the failed attempt to impeach him.[241]

However, the president was not the only reason why Reconstruction foundered. On the ground, Freedmen's Bureau officials often failed to exercise oversight to ensure that freed slaves did not enter into exploitative contracts.[242] Those officials believed that a system of free labor required nothing more than freed slaves entering into contracts, regardless of the conditions of those contracts.[243] Even worse, many officials coerced slaves into signing contracts with their former masters, denying them even a formal liberty of contract.[244] Freed slaves were understandably afraid that if they entered into contracts with their masters, they would be dragged back into slavery.[245] Many slaves sought to own their own land, but attempts at land reform foundered in the Reconstruction Congress.[246] Therefore, many freed slaves were forced to contract with their former masters.[247] Most importantly, the Bureau was unable to protect freedmen from violence that was directed at maintaining their subservience as

---

234 *Id.* at 98.
235 *Id.* at 101.
236 *See* NIEMAN, *supra* note 203, at 74–76.
237 FONER, *supra* note 62, at 101, 117.
238 *See* NIEMAN, *supra* note 203, at 162–63; *see also* STANLEY, *supra* note 15, at 36.
239 *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869 248, 250 (1st ed. 1974).
240 NIEMAN, *supra* note 203, at 115.
241 *See* BENEDICT, *supra* note 239, at 244, 250.
242 *See* NIEMAN, *supra* note 203, at 163–64.
243 *See* STANLEY, *supra* note 15, at 36.
244 *See* NIEMAN, *supra* note 203, at 168.
245 STANLEY, *supra* note 15, at 40.
246 FONER, *supra* note 62, at 131.
247 *See* NIEMAN, *supra* note 203, at 168–69.

workers.[248] To a large degree, Bureau officials were absorbed by their belief in the liberal theory of contract and often imposed contracts on freed slaves regardless of whether the contracts were fair or equitable.[249]

Freedmen's Bureaus "enforced the regime of contract," demanding fidelity to contracts in labor and marriage.[250] Bureau Chief General O.O. Howard assigned assistant commissioners to encourage planters and hired hands to sign contracts with one another.[251] Howard initially assumed that planters would act in good faith and he sought to avoid paternalistic measures.[252] Howard believed in the market to "provide[] discipline, order, and direction."[253] Under Howard's leadership, some Freedmen's Bureau officials were conscientious about their jobs and rejected contracts that they viewed as unduly coercive.[254] Even before the war ended, however, many Freedmen's Bureau officials coerced former slaves into signing and fulfilling annual contracts with planters in occupied areas of the confederacy, especially in the state of Louisiana.[255] Rather than protecting freed slaves from harm, many Bureau officials focused on teaching them how to be autonomous actors in the labor market.[256] Their goal was no more than a formal right to contract.[257] Freedmen's Bureau officials knew that southern whites were prejudiced and would try to maintain slavery.[258] Nonetheless, they imposed contracts on freed slaves, often requiring them to sign contracts with their former masters.[259]

The formal right to contract that was key to Freedmen's Bureau officials had its roots in abolitionist ideology. However, forcing slaves to enter into contracts clearly violates even the formal right to contract.[260] Moreover, the actions of Freedmen's Bureau officials were inconsistent with the overall Reconstruction effort, which sought to protect the rights of newly freed slaves. The formalistic right to contract did little to help those freed slaves.[261] To the contrary, the Freedmen's Bureau officials' fetishistic adhesion to the ideology of contract without protective measures severely undermined the Reconstruction effort.[262]

---

248 *Id.* at 123–24, 132, 177.
249 *See id.* at 156, 179.
250 STANLEY, *supra* note 15, at 36–37.
251 NIEMAN, *supra* note 203, at 60.
252 *See id.* at 60–61.
253 *Id.* at 55.
254 *See id.* at 65.
255 MONTGOMERY, *supra* note 29, at 85.
256 *See* NIEMAN, *supra* note 203, at 55.
257 *See id.* at 56.
258 *See id.* at 57.
259 *Id.* at 60.
260 *See id.* at 156, 160.
261 *See id.* at 164.
262 *See id.*

C. The Reconstruction Congress and Liberty of Contract

In contrast to Freedmen's Bureau officials, members of the Reconstruction Congress did not see themselves as bound by the formal right to contract. As they debated what liberty of contract would mean to freed slaves and northern workers, members of the Reconstruction Congress adopted regulations to protect their rights. At the same time as it authorized the Freedmen's Bureau to enforce liberty of contract in the former slave states, the early Reconstruction Congress also implemented a new paradigm of free labor throughout the country.[263] The Reconstruction Congress had seen how former slaveholders used exploitative contracts to constrain their former slaves and impose indentured servitude on them under the Black Codes.[264] They understood that only active intervention of the federal government could prevent this from occurring, so they enacted measures to protect the former slaves' liberty of contract from that exploitation.

Immediately after the Thirteenth Amendment became law, they began debating legislation that would protect the right to contract for freed slaves. Responding to the Black Codes and protecting the liberty of contract for freed slaves was their first priority. Their first legislation, which eventually became the 1866 Civil Rights Act, prohibited race discrimination in the exercise of the right to contract and established a right "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[265] A year later, the same Congress that enacted the 1866 Civil Rights Act banned indentured servitude throughout the country with the 1867 Anti-Peonage Act.[266] In 1868, the Reconstruction Congress enacted an Eight Hour Act which limited the work day of federal workers—the primary goal of the northern labor movement.[267] All of these measures protected the contractual rights of freed slaves and other workers with affirmative measures to bolster their bargaining power.

The Reconstruction Congress enacted the 1866 Civil Rights Act as a response to the southern states' Black Codes' restrictions on the rights of freed slaves.[268] The primary reason for the southern Black Codes was to ensure a ready population of low paid and easily exploited laborers to replace the slaves on which the southern economies relied.[269] The Black Codes did so by restricting the movement of freed slaves and requiring them to enter into indentured

---

[263] VanderVelde, *supra* note 67, at 453.

[264] GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 6 (2013).

[265] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

[266] Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867).

[267] Eight Hour Act, ch. 72, 15 Stat. 77 (1868); *see also* MONTGOMERY, *supra* note 13, at 238.

[268] RUTHERGLEN, *supra* note 264, at 6.

[269] FONER, *supra* note 62, at 104.

servitudes.[270] One Ohio legislator said it would be a "mockery" to "yet deny [to freedmen] the right to make a contract and secure the privilege and the rewards of labor."[271] The 1866 Civil Rights Act thus established freed slaves as citizens with the right to contract free of racial discrimination.

Countering the Black Codes, the 1866 Act thus combatted both slavery and involuntary servitude. Opponents of the 1866 Act argued that it would "promote feud and enmity between the white employer and the black laborer."[272] In his veto message, President Andrew Johnson also condemned its impact on the southern labor structure. He explained, "This bill . . . . intervenes between capital and labor, and attempts to settle questions of political economy through the agency of numerous officials, whose interest it will be to foment discord between the two races."[273] By voting in favor of the Act and overruling President Johnson's veto, over two-thirds of the Reconstruction Congress sided with the black laborers to protect their right to free labor and liberty of contract.[274]

With the 1867 Anti-Peonage Act, the Reconstruction Congress responded to the peonage in the New Mexico territory, which, members of Congress pointed out, was very much like slavery.[275] The 1867 Anti-Peonage Act enforced the "involuntary servitude" provision of the Thirteenth Amendment by prohibiting "the holding of any person to service or labor under the system known as peonage" in any place in the United States or the territory of New Mexico.[276] The Act described peonage as "establish[ing], maintain[ing], or enforce[ing] . . . directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise."[277] The Anti-Peonage Act prohibited both "voluntary" and "involuntary" servitude to empower workers and prevent them from entering into unduly exploitative contracts.[278] This provision preempted the argument that peonage was not involuntary if workers voluntarily began the relationship, "so that there could be absolutely no question about the scope of the practices outlawed."[279] Supporters of the Act claimed that it did not matter whether labor chose servi-

---

[270] *See id.* at 104.

[271] STANLEY, *supra* note 15, at 55–56; *see also id.* at 55 ("the equal right of contract was the nub of the [1866 act].").

[272] CONG. GLOBE, 39th Cong., 1st Sess. 1416 (1866).

[273] *Id.* at 1681.

[274] *But cf.* NIEMAN, *supra* note 203, at 110 (pointing out that the southern states evaded the 1866 Civil Rights Act by adopting race neutral anti-vagrancy laws and enforcing them only against blacks).

[275] CONG. GLOBE, 39th Cong., 2d Sess. 346 (1867).

[276] Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867); *see* STEINFELD, *supra* note 4, at 183–84.

[277] Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867).

[278] Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1610 (2012).

[279] STEINFELD, *supra* note 4, at 184 (stating the anti-peonage act "marked the triumph in law of free labor ideas, denying to states the authority to enact legislation that might criminally punish breaches of labor contracts or specifically compel their performance.").

tude—what mattered was "whether the resulting condition was degrading to workers and employers."[280] There were few opponents of the Act, and none raised any concerns about the impact of the law on the right to contract.[281] This Anti-Peonage Act thus limited the worker's liberty of contract in order to protect the liberty of the worker from undue exploitation.

While the 1866 Act is justly celebrated as a landmark civil rights measure,[282] the 1867 Anti-Peonage Act is less well-known. However, the Anti-Peonage Act was equally transformative. The 1867 Act "marked the triumph in law of free labor ideas, denying to states the authority to enact legislation that might criminally punish breaches of labor contracts or specifically compel their performance."[283] The sponsor of the Act, former Free Soiler Senator Henry Wilson, explained that the Act would elevate the status of all low-wage workers because where peonage had been eliminated, "peons who once worked for two or three dollars a month are now able to command respectable wages . . ."[284] Pennsylvania Senator Charles Buckalew agreed that the terms of debt service were "always exceedingly unfavorable" to the laborer, and argued that the system "degrades both the owner of the labor and the laborer himself."[285] Thus, the Reconstruction Congress not only abolished chattel slavery but also enacted laws directed at exploitative employment practices.[286]

Without Black Codes and vagrancy laws, Blacks could use "labor shortage" to their economic advantage.[287] As a result of Reconstruction measures, 1867 to 1873 was a period of rising wages for Blacks.[288] Protecting the freed slaves' liberty of contract thus had concrete economic results.

D. The 1868 Eight Hour Act and Liberty of Contract

In 1868, the Reconstruction Congress enacted a law which established an eight-hour workday for federal employees.[289] The 1868 Eight Hour Act responded to the northern labor movement's complaints about wage slavery, attempting to ameliorate the plight of northern workers who increasingly toiled in wage earning industrial jobs.[290] In congressional debates, supporters of the act expressed the free soil ideology that they used to oppose slavery before the

---

[280] Pope, *supra* note 102, at 1486.

[281] *See* STEINFELD, *supra* note 4, at 184.

[282] *See* Michael Vorenberg, *The 1866 Civil Rights Act and the Beginning of the Military Reconstruction*, *in* THE GREATEST AND GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY 60, 60 (Christian G. Samito ed., 2018).

[283] STEINFELD, *supra* note 4, at 184.

[284] CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867).

[285] *Id.* at 1572.

[286] *See generally* Soifer, *supra* note 278, at 1607, 1616–17.

[287] FONER, *supra* note 62, at 118.

[288] *Id.* However, Black wages fell during 1873 depression. *Id.* at 120.

[289] Eight Hour Act, ch. 72, 15 Stat. 77 (1868).

[290] *See* MONTGOMERY, *supra* note 13, at 238.

Civil War; they also said that the Act would promote the dignity of labor.[291] Supporters of the Act argued that workers in the Union Army who had made sacrifices during the war were entitled to legal protections when they returned home.[292] Opponents of the bill argued that it infringed on the workers' liberty of contract.[293] By approving the Act, a majority of the Congress rejected those arguments and accomplished a major goal of the labor movement at the time. The Eight Hour Act went well beyond formal freedom of contract to ensure that workers were truly free, that they would have time to develop themselves and function as full citizens of the republic.

The 1868 Eight Hour Act was sponsored by Indiana Representative George Julian, a long-time activist in the antislavery movement.[294] Julian was joined by other radical Republicans who also connected the plight of the northern worker with that of the newly freed slave.[295] Senate supporters of the Eight Hour Act invoked a glorified image of the working man.[296] California Senator John Conness said: "I am one of those who believe . . . that toil is reputable; that it is ennobling; that it lends true courage. I believe that the toilers, after all, are the men upon whom every society that is well ordered has to rely."[297] The Act's supporters also noted the military sacrifices of those in the working class.[298] They argued that the bill would improve the lives of working people and remedy the perils of wage slavery.[299] As Senator Conness declared, "[l]et no man forget, because his task is made easy in this world, the thousands, the tens of thousands, and the hundreds of thousands who labor and toil for an ill-requited compensation . . . . Make their path as easy as you can by limiting their hours of labor."[300] Senator Henry Wilson agreed:

---

[291] *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 413 (1867) (Senator Conness speaking).

[292] *See infra* note 298.

[293] For example, Fessenden explained, "I am opposed utterly to the idea of regulating hours of labor by law." CONG. GLOBE, 40th Cong., 2d Sess. 3428 (1868).

[294] CONG. GLOBE, 40th Cong., 1st Sess. 105 (1867).

[295] The bill's ardent supporters were radicals, including Cole, Conness, Cragin, Harlan, McDonald, Morton, Nye, Ramsey, Seward, Tipton, Wade and Wilson. MONTGOMERY, *supra* note 13, at 318.

[296] *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 412 (1867) (Senator Conness speaking); *Id.* at 413 (Senator Wilson speaking).

[297] *Id.* at 412.

[298] Conness argued that during the war, the country depended on "arms made strong by toil." He continued, "When I saw the column of Burnside . . . I saw scarcely any but those who had the marks of toil and stalwart labor, black and white; and if I never before that time reverenced the men who labor, I should do it beginning at that period of my life." *Id.* at 412–13.

[299] *Id.* at 413.

[300] *Id.* at 413. Senator Cole noted that the bill would allow workers more time "devoted to the improvement of the mind and social faculties" and argued that "all American citizens should be enabled to devote some portion of their time to the cultivation of the intellect. Our Republic stands upon the intelligence of the people; it has no other foundation; and unless the people are provided by law with some protection against the requirement which is now put upon them by the exorbitant demands of capitalists, they will not be so well prepared to

> In this matter of manual labor I look only to the rights and interests of labor. In this country and this age, as in other countries and in other ages, capital needs no champion; it will take care of itself, and will secure, if not the lion's share, at least its full share of profits in all departments of industry.[301]

The Act would protect these workers from "wage slavery." The debates over the 1868 Eight Hour Act revealed the split between the advocates of a formal right to contract, and those who adhered to a more substantive model. Proponents of the Act viewed it as a means to enforce a meaningful right to free labor, but the 1868 Act arguably violated the right of the worker to contract to work more hours.[302] "Opponents of the [1868 Eight Hour Act] argued that it was a paternalistic measure that intruded on the workers' [right to] liberty of contract."[303] Conservative Republican Senator William Pitt Fessenden of Maine, who represented the interests of the commercial classes, claimed that "the bill works against the industrious, against the enterprising, against those who want to better their condition by work."[304] Fessenden explained, "I am opposed utterly to the idea of regulating hours of labor by law."[305] Republican Maine Senator Lot Morrill agreed that "it is a degradation of the working men of our country to deprive them of the privilege of making contracts to work for just whatever sum and for whatever time they please."[306] Morrill continued:

> I believe in leaving the people of this country at perfect liberty to make any contracts they please; and as I was observing, if this should become the rule and custom of the country, a man with a large family, who was compelled to work all of his time that his strength would permit, would be unable to support his family . . . .[307]

"[Republican] Connecticut Senator Orris Ferry agreed, saying that if he was a day laborer, 'I never would consent that the Government under which I live should interfere either with my rates of wages or with my hours of labor.' "[308] These members of Congress articulated the Lochnerian liberty of contract.[309] However, they were outvoted by their peers who saw the right to contract as a means to achieve full citizenship for workers.[310]

---

perform the duties of American citizenship." CONG. GLOBE, 40th Cong., 2d Sess. 3425 (1868).

[301] CONG. GLOBE, 40th Cong., 2d Sess. at 3426 (1868).

[302] *See* MONTGOMERY, *supra* note 13, at 248.

[303] ZIETLOW, *supra* note 18, at 150.

[304] *Id.* (internal quotation marks omitted); *see* MONTGOMERY, *supra* note 13, at 60 (characterizing Fessenden as a supporter of commercial interests).

[305] CONG. GLOBE, 40th Cong., 2d Sess. 3428 (1868).

[306] *Id.* at 3426.

[307] *Id.*

[308] ZIETLOW, *supra* note 18, at 151.

[309] In *Lochner*, the Court held that a New York State law limiting the hours of bakers violated the workers' right to contract. Lochner v. New York, 198 U.S. 45, 53 (1905).

[310] For example, California Senator John Conness said, "I am one of those who believe . . . that toil is reputable; that it is ennobling; that it lends true courage. I believe that the toilers,

Until now, the 1868 Eight Hour Act was virtually ignored by constitutional scholars. The Act was limited in scope, it was never fully enforced, and the Supreme Court eventually struck it down as violating the right to contract.[311] But the congressional debate over this Act shines an important light on the debate over the meaning of the right to contract in the Reconstruction Era. Just under forty years later, the United States Supreme Court struck down a similar law as violating the right to contract in *Lochner v. New York*.[312] Yet the congressional debates over the 1868 Eight Hour Act revealed that a majority of the members of the Reconstruction Congress rejected the reasoning of the *Lochner* Court and voted in favor of a law that directly regulated employment contracts to protect the rights of workers.

CONCLUSION

The meaning of liberty of contracts has been central to debates over workers' rights throughout the history of our country. Even though the Reconstruction Era right to contract allows for government intervention to empower workers exercising that right, the Lochnerian individualist right to contract is frequently invoked to oppose those measures. Yet the lost history of the Thirteenth Amendment and the right to contract reveals that the Reconstruction Era right to contract is much broader, and more robust, than that adopted by the Court in *Lochner*. Fugitive slaves, freed slaves, and northern workers, all sought more control over their working lives to enable them to exercise autonomy and the full rights of citizenship. The Reconstruction Congress responded to their pleas, enforcing the right to contract as a means to achieve free labor and effective freedom.

after all, are the men upon whom every society that is well ordered has to rely." CONG. GLOBE, 40th Cong., 1st Sess. 412 (1867).

311 *See* ZIETLOW, *supra* note 18, at 151.

312 *Lochner*, 198 U.S. at 53.